86-1227

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT J. BAVISOTTO,

Petitioner.

vs.

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FOURTH DEPARTMENT

NIXON, HARGRAVE, DEVANS & DOYLE
Lincoln First Tower
P.O. Box 1051
Rochester, New York 14603
(716) 546-8000

William D. Eggers
Counsel of Record
T. Andrew Brown
Counsel for Petitioner

January 12, 1987

Daily Record Corporation
Rochester, New York

(13220)

QUESTION PRESENTED

Whether a state court is in violation of federal statutory and constitutional law by issuing an eavesdropping warrant authorizing a wiretap prior to an appropriate showing that "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous. . . ." 18 U.S.C. § 2518(1)(c).

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PEOPLE OF THE STATE OF NEW YORK,

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PETITIONER FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FOURTH DEPARTMENT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of New York, Appellate Division, Fourth Department, rendered in this case on May 23, 1986.

OPINION BELOW

The opinion of the Appellate Division is reported at 502 N.Y.S.2d 867, and is reprinted in the appendix hereto at A-1.

The Certificate Denying Leave to appeal to the New York Court of Appeals is also reprinted in the appendix hereto, at A-5.

JURISDICTION

The Appellate Division decision was rendered on May 23, 1986. By Certificate dated October 22, 1986, the New York Court of Appeals denied leave to appeal the Appellate Division's decision.

On December 11, 1986, Justice Marshall ordered that the time for filing this petition for writ of certiorari be extended to and including January 20, 1987.

The jurisdiction of this Court to review the judgment of the Appellate Division is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether a state court is in violation of federal statutory and constitutional law by issuing an eavesdropping warrant authorizing a wiretap prior to an appropriate showing that "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous. . . ." 18 U.S.C. § 2518(1)(c).

STATUTE INVOLVED

18 U.S.C. § 2518, in relevant part:

> (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall . . . include the following information:
>
> > (c) . . .a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous. . . .
>
> (3) Upon such application the judge may enter an . . . order . . ., authorizing or approving interception of wire or oral

communications on the basis of the facts submitted by the applicant that —

> (c) . . .normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous. . . .

STATEMENT OF THE CASE

Petitioner Robert J. Bavisotto was convicted on May 26, 1982, following a jury trial in the County Court of Steuben County, New York, of the crimes of Criminal Sale of a Controlled Substance in the First Degree, Criminal Sale of a Controlled Substance in the Second Degree, Conspiracy in the Second Degree, Conspiracy in the Fourth Degree and Criminal Sale of Marijuana in the First Degree. On October 12, 1982, petitioner was sentenced to concurrent terms of imprisonment totalling 20 years to life.

The prosecution commenced in Chemung County, New York, in August, 1980. On August 28, 1980, the Chemung County District Attorney applied to the Chemung County Court for an eavesdropping warrant to wiretap the telephone of one Steven Morse. In his application (A-13), the District Attorney asserted that he had caused investigations to be made into certain controlled substance crimes and that based upon the facts contained in the accompanying affidavits of narcotics investigators Ronald G. Martin (A-19) and Robert L. Van Hall (A-25), he had probable cause to believe that Morse was committing such crimes over the target telephone. The District Attorney asserted that based upon the Martin and Van Hall affidavits, "normal investigative procedures reasonably appear to be unlikely to succeed if tried", and further asserted that normal investigative procedures could not provide information with regard to the hierarchy of the drug operation that was thought to be taking place (A-15).

Martin alleged in his affidavit that on August 14, 1980, a confidential informant had told him that he had purchased eight ounces of cocaine from Morse over the previous three month period by calling the target telephone. Martin alleged that on said date, he, Martin, listened in on and recorded a telephone call made by said informant to the target telephone wherein the informant and Morse discussed payment of $1,500, and that shortly after said telephone call he observed Morse meet with the informant (A-20). (A copy of the recorded telephone call is contained in the appendix hereto at A-29). Martin also alleged that he believed the informant when the informant told him that Morse could get as much cocaine as the informant wanted (A-21).

Martin further alleged that the location of the Morse trailer in which the target telephone was located was such that anything other than spot surveillance was impractical (A-21). He described the trailer simply as the seventh trailer on the north side of the south branch of the "Y" road in the Collingwood Trailer Park, a trailer park (A-20), totally failing to explain the basis for his claim that anything other than spot surveillance was impractical.

Martin alleged that persons other than drug traffickers entered and left the Morse trailer (A-21-22) and that that made it unlikely that surveillance would disclose those supplying cocaine to, or purchasing cocaine from, Morse. He asserted that execution of a search warrant on the trailer would not be likely to yield evidence of the source of Morse's cocaine or of the identities of others involved in the purchasing and distribution of cocaine from Morse (A-22), but failed to explain the basis for said assertion.

Martin alleged that based on conversations with "*a* confidential informant", he believed that it was not possible for that informant to introduce an undercover operative to Morse for the purpose of making a cocaine purchase, and further alleged that that informant did not know the source of Morse's cocaine

(A-22). Martin failed to indicate whether that informant was the same confidential informant previously mentioned in his affidavit.

Van Hall alleged in his affidavit that on August 14, 1980, he proceeded with a confidential informant to a grocery store located near the front of the trailer park and observed the informant make a telephone call which the informant said was to Morse at the target telephone (A-26). Van Hall alleged that after the telephone call, he was told by the informant that Morse was on his way to the store. Van Hall alleged that he then gave the informant $1,500 and shortly thereafter observed Morse arrive at the store and converse with the informant (A-26). Van Hall alleged that after Morse had left the store, the informant told him that Morse had taken the $1,500 and requested that the informant meet him at the back of the trailer park to receive $1,500 worth of cocaine (A-26). Van Hall alleged that he drove the informant to the back of the trailer park, observed the informant enter Morse's vehicle, and observed Morse pull off the road behind his vehicle (A-27). Van Hall alleged that after getting out of Morse's vehicle, the informant returned to Van Hall's vehicle with a baggie containing a white substance, subsequently tested positive for cocaine (A-27-28).

The Chemung County Court (Monroe, J.) issued an eavesdropping warrant on August 28, 1980, authorizing a wiretap of the Morse telephone and interception of conversations relating to the purchase and sale of "cocaine and other controlled substances" (A-9). The Warrant specified as its basis only the aforesaid District Attorney's application and the Martin and Van Hall affidavits (A-7-8).

Pursuant to the August 28 Warrant, numerous conversations were seized. These conversations subsequently provided the basis for two additional eavesdropping warrants. The interception

of conversations under the three warrants led to the arrest of petitioner.

By Notice of Motion dated September 14, 1981, petitioner moved prior to trial for, *inter alia,* suppression of all wiretap-related evidence upon the grounds that the underlying affidavits insufficiently recited the inadequacy of alternative investigatory procedures, in violation of both New York and federal statutory requirements. Petitioner's suppression motion was denied and the evidence obtained pursuant to the eavesdropping warrants was subsequently used to convict him.

Following petitioner's conviction, he appealed to the New York Supreme Court, Appellate Division, Fourth Department, contending, *inter alia,* that the eavesdropping warrants, which led to his arrest and conviction, were improperly issued, in violation of the United States Constitution and both federal and state statutory law, and should have been suppressed at pre-trial motion. On May 23, 1986, the Appellate Division rendered a decision reversing petitioner's convictions for the conspiracy charges and for the sale of marijuana, relying on other New York State court decisions, but found, that the issuance of the eavesdropping warrants was not an abuse of discretion. The Appellate Division improperly upheld the issuance of the warrants by grouping all of the warrant applications together and basing its ruling upon *all* of the affidavits submitted in support of the applications. *I.E.,* the Appellate Division should have based its ruling with respect to the first warrant issued solely on the application and accompanying affidavits submitted in support of that warrant, without regard to the applications and affidavits submitted for the subsequent warrants.

On October 22, 1986, the New York Court of Appeals denied petitioner leave to appeal the Appellate Division's decision.

REASONS FOR GRANTING THE WRIT

I. ***The opinion below conflicts with decisions of this Court and other Federal Circuit Courts.***

Before a court may issue an eavesdropping warrant authorizing wiretapping of an individual's telephone, federal statutory law requires a showing that investigative procedures less intrusive than a wiretap have been tried and failed or are unlikely to succeed if tried or are too dangerous to be tried.

18 U.S.C. § 2518, in relevant part, provides:

> (1) Each application for an order authorizing or approving the interception of a wire or oral communications . . . shall include the following information:
>
> > (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous. . . .
>
> (3) Upon such application the judge may enter an . . . order . . . authorizing or approving interception of wire or oral communications . . . if the judge determines on the basis of the facts submitted by the applicant that —
>
> > (c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous. . . .

Requirements pursuant to the above federal statute are identical to those pursuant to Sections 700.15(4) and 700.20(2)(d) of the New York Criminal Procedure Law. The Second Circuit has "previously cited the parallel provisions together, [see] *e.g., United States v. Fury,* 554 F.2d 522, 529 at n. 6 (2d Cir. 1977), *cert. denied,* 436 U.S. 931 . . . (1978), and cited alternatively federal and state cases. *Id.* at 530." *United States v. Lilla,* 699 F.2d 99, 102 (2d Cir. 1983). The New York statute was designed so as to harmonize state and federal standards for court-authorized

eavesdropping warrants. See *United States v. Lilla, supra,* at 102; *People v. McGrath,* 46 N.Y.2d 12, 26 (1978), cert. denied, 440 U.S. 972 (1979).

The honorable Court has told us that the statutory requirement is "simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States v. Kahn,* 415 U.S. 143, 153 n. 12 (1974).

The honorable Court has further elucidated that Congress:

> evinced the clear intent to make doubly sure that statutory authority be used with restraint. . . . These [wiretap] procedures were not to be routinely employed as the initial step in criminal investigation. Rather, the applicant must state and the court must find that normal investigative procedures have been tried and failed . . .

United States v. Giordano, 416 U.S. 505, 515 (1974).

Admittedly, traditional surveillance techniques need not be exhausted first if they are impractical or costly and inconvenient. *United States v. Lilla, supra,* at 102. Nevertheless, to protect one's Fourth Amendment constitutional right to privacy, an application and accompanying affidavits seeking an eavesdropping warrant must provide a sufficient basis for a judge to reach an independent conclusion that less intrusive investigative procedures are not feasible. See *United States v. Lilla, supra,* at 103. There must be a "full and complete statement . . . why [normal, less intrusive procedures] reasonably appear to be unlikely to succeed. . . ." 18 U.S.C. § 2518(1)(c).

In granting the August 28, 1980 warrant, the issuing court failed to uphold the statutory requirement, as well as the dictates of the *Kahn* and *Giordano* decisions, by issuing said warrant without first being provided with the required "full and complete statement" which would have enabled the court to make an inde-

pendent and fully informed decision as to the true necessity of the warrant, as the following discussion reveals.

In this case, Investigators Martin and Van Hall utilized a confidential informant on August 14, 1980, to purchase an ounce of cocaine from Steven Morse. Van Hall accompanied the informant to make the purchase, which took place near Morse's residence. Neither the Martin nor Van Hall affidavit revealed any indication that Morse sought to avoid the sale of cocaine even though the informant was accompanied by Van Hall, a total stranger to Morse.

In view of the ease and simplicity of the arranged cocaine purchase, Martin nonetheless alleged in his affidavit that:

> It would not be possible for said confidential informant to introduce an undercover operative to STEVE MORSE for the purpose of making a cocaine purchase.

Martin's statement simply does not square with common sense. Consider the Second Circuit's recent statement in regard to similar facts:

> The record . . . does not support the conclusion that other investigative procedures were either unlikely to succeed or were too dangerous to use. If anything, the record establishes the contrary proposition: the normal investigative procedures that were used were successful. Trooper Cook was able, through his informant, to 'make a buy'. . . ."

United States v. Lilla, supra, at 104.

In the instant case, as in *United States v. Lilla,* the only normal investigative procedures that were attempted, those surrounding a monitored cocaine purchase, were successful. Resort to eavesdropping was unnecessary and should have never been authorized, especially since all less intrusive investigatory procedures attempted had been successful and they presented no danger to the participating police officers.

Martin's claim that eavesdropping was the only means to determine the identity of others involved in the Morse cocaine trafficking operation was not supported by any allegation of investigative procedures attempted prior to the application for the wiretap. The application failed to reveal any reason why the informant used in the arranged purchase, or any other informant, could not also have been used to infiltrate and identify others in the cocaine operation. The application provided no indication that any informant had ever sought to infiltrate the cocaine operation or had ever been asked to do so. "It is not unreasonable to expect the government to utilize those methods that appear to be potentially productive." *United States v. Ippolito*, 774 F.2d 1482, 1486 (9th Cir. 1985).

Martin's claim that it would not be possible for a confidential informant to introduce an undercover operative to Morse for the purpose of a cocaine purchase based on "conversations with a confidential informant" was not supported by any alleged facts. Martin did not even indicate whether that informant was the same person used as an informant in the successful arranged buy. Martin neither set forth facts to establish the reliability of the informant, nor of the information supplied by the informant, nor the basis for alleging inability to make an introduction of an undercover operative to Morse. Martin in no way specified what his "conversations" were which allegedly convinced him that introduction of an undercover operative to Morse would not be possible. The application was totally silent as to what steps, if any, the informant had taken to try to introduce a police operative to Morse or what basis, if any, there was for concluding that such an introduction would not be possible.

The fact that an informant was able to induce Morse to sell an ounce of cocaine while the informant was accompanied by Van Hall, a total stranger to Morse, should have raised substantial

doubt both as to the claimed inability to introduce an undercover operative to Morse and as to Martin's asserted belief of same.

The application for the warrant failed to reveal any pattern of conduct by Morse which would indicate that he was a careful and evasive individual likely to make non-wiretap surveillance unsuccessful. To the contrary, the record reveals just the opposite. The telephone conversation between Morse and the informant included with the August 28, 1980 application revealed that Morse used no secret code language nor any evasive words in reference to narcotics. Also, the fact that Morse sold cocaine in broad daylight, in a public place, and in the sight of an unknown third person indicated that Morse was not a cautious and careful individual who might not be subject to effective surveillance. Lastly, the application for the warrant sets forth police effort occurring entirely on just one day, August 14, 1980, making it highly unlikely that the police could have known how careful or evasive, if at all, Morse was.

Martin's claim that persons other than drug traffickers entered and left the Morse trailer so that surveillance would likely be unavailing was also not supported by any facts alleged in the application. Neither the Martin nor Van Hall affidavit stated or even suggested that an unusual number of people were entering or leaving the Morse trailer. Nothing in the application suggested that the Morse trailer was anything but a normal, single-family resident trailer, situated in a trailer park, having a normal influx of visitors. Nothing in the application suggested that rental of any of the neighboring trailers for purposes of surveillance had been attempted or even considered. It was entirely possible that surveillance of the trailer would have disclosed the identity of the subjects who were involved with Morse in the trafficking of cocaine, particularly since Martin had an informant who could stimulate drug transactions at pre-determined times which would make surveillance all the more effective.

The only showing of any attempt of surveillance of the Morse trailer was that during the few minutes when the investigators observed Morse meet with the informant and proceed to consummate a $1,500 sale of cocaine. Martin's claim that surveillance would not disclose the identity of those dealing in cocaine with Morse was wholly unsupported by the record.

The investigation revealed in the application consisted of just one day of *successful* effort by the police, which amounted to the use of an informant to arrange and carry out a monitored purchase of cocaine. Recognizing that the purpose of the investigation was to identify unknown persons involved in cocaine trafficking with Morse, the following observation by the Second Circuit is pertinent:

> The individuals involved in this conspiracy, 'far flung' or otherwise, would obviously remain 'unknown' until some sort of investigative efforts were attempted.

United States v. Lilla, supra, at 105, n. 6. In *United States v. Baker,* 589 F.2d 1008 (9th Cir. 1979), the Ninth Circuit upheld eavesdropping where the application:

> was not comprised of mere 'boilerplate', conclusionary language, circumstances that would be expected in the investigation of the ordinary . . . case, the *stretching of a single investigative episode into a 'full and complete statement',* or undue reliance upon the investigator's experience in other cases.

589 F.2d at 1011 (emphasis added).

The application in the instant case is a model for precisely the kind of application routinely held to be insufficient by the Federal Circuit Courts — *i.e.,* containing facts showing successful police investigation to the limited extent attempted, stretching a single investigative episode into a purported "full and complete statement" as to why less intrusive procedures would not suc-

ceed, and presenting mere conclusory allegations as to why less intrusive procedures are insufficient. The application set forth an incomplete description of the course of the investigation and provided no factual basis upon which the issuing Court could independently determine, apart from the conclusions of Martin and Van Hall, whether normal, less intrusive, investigative techniques might have been successful.

The Second Circuit recently stated, "Like other courts, we reject generalized and conclusory statements that other investigative procedures would prove unsuccessful." *United States v. Lilla, supra,* at 104. See also *United States v. DiMuro,* 540 F.2d 503, 510-511 (1st Cir. 1976), *cert. denied,* 429 U.S. 1083 (1977); *United States v. Vento,* 533 F.2d 838, 849-850 (3rd Cir. 1976); *United States v. Kalustian,* 529 F.2d 585, 590 (9th Cir. 1975).

It is apparent that the prosecution in this case resorted to eavesdropping as an initial step in criminal investigation. It is further apparent that both the issuing court authorizing the warrant and the Appellate Division in upholding the issuance proceeded in conflict with the statutory requirements and in total disregard to the rulings of this Court in *Kahn* and *Giordano*, and the Federal Circuit Courts. It is necessary that the Court grant the writ of certiorari to eliminate the conflict between the New York and federal courts as to the required showing of necessity prior to the issuance of an eavesdropping warrant.

II. ***The fact that the decision below sanctioned such an extraordinary departure from the statutory requirements for issuing an eavesdropping warrant illustrates that an exercise of the Court's power of supervision is desperately needed.***

The rationale for requiring a full and complete statement regarding normal investigative procedures attempted or at least considered prior to submitting an application for eavesdropping is that it "serves both to underscore the desirability of using less

intrusive procedures and to provide courts with some indication of whether any efforts were made to avoid needless invasion of privacy." *United States v. Lilla, supra,* at 104. The conclusory allegations made in the application and accompanying affidavits seeking an eavesdropping warrant in this case provided no assurance that resort to eavesdropping was necessary or that the use of less intrusive investigative procedures would not have been successful.

Even if eavesdropping might have been a simpler, more effective means of investigation, that does not justify resort to wiretapping absent exhaustion of all reasonable normal investigative procedures. The exhaustion requirement reflects a Congressional judgment that the cost of efficiency in terms of private interests is too high. *United States v. Lilla, supra,* at 105, n. 7.

Judicial scrutiny of wiretaps is necessary from a constitutional standpoint and is an appropriate way to restore public confidence in our policing institutions. The fact that the decision below sanctioned such an extraordinary departure from the statutory requirements prior to issuing an eavesdropping warrant illustrates that an exercise of the Court's power of supervision is desperately needed to make clear to the courts of New York and throughout our nation that mere conclusory statements as to the sufficiency of less intrusive procedures, and as to the necessity of a wiretap, are insufficient to overcome an individual's constitutional right to privacy.

CONCLUSION

For the above-stated reasons, this petition for certiorari should be granted.

Dated: January 12, 1987

Respectfully submitted,

NIXON, HARGRAVE, DEVANS & DOYLE
Lincoln First Tower
P.O. Box 1051
Rochester, New York 14603
(716) 546-8000

William D. Eggers
Counsel of Record
T. Andrew Brown
Counsel for Petitioner

APPENDIX

OPINION OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FOURTH DEPARTMENT

[People v. Bavisotto
Cite as 502 N.Y.S.2d 867 (A.D. 4 Dept. 1986)
502 New York Supplement, 2d Series
Pages 867-868]

PEOPLE of the State of New York, Respondent,
v.
Robert J. BAVISOTTO, Appellant.

Supreme Court, Appellate Division, Fourth Department.

May 23, 1986.

Defendant was convicted for criminal sale of a controlled substance in the first degree and related offenses in the Steuben County Court, Finnerty, J., and he appealed. The Supreme Court, Appellate Division, held that: (1) issuance of eavesdropping warrants was not abuse of discretion where evasiveness of defendant and associates made it unlikely that normal investigative procedures would succeed; (2) evidence was insufficient to support convictions for conspiracy where nothing in telephone conversation established agreement to sell; and (3) warrant for eavesdropping on conversations relating to marijuana was unauthorized.

Judgment affirmed as modified.

1. Telecommunications — 516

Issuance of warrants authorizing eavesdropping on drug trafficking suspect was not abuse of discretion where evasiveness of suspect and associates made it unlikely that normal investigative procedures, such as physical surveillance, undercover operatives or use of search warrant would reveal sources of drug supply or

enable police to gather evidence against higher echelon of drug operation. McKinney's CPL §§ 700.15, subd. 4, 700.20, subd. 2(d).

2. Conspiracy — 47(12)

Evidence was insufficient to support convictions for conspiracy in second and fourth degrees in prosecution which resulted in defendant's conviction for criminal sale of controlled substance in first degree where nothing in telephone conversations which constituted conspiracy evidence established agreement to sell cocaine or marijuana.

3. Telecommunications — 520

Warrant for eavesdropping on conversations related to sale of marijuana was unauthorized. McKinney's CPL § 700.05, subd. 8.

Kevin Bradley, Canisteo, for appellant.

Larry D. Bates, by Raymond Roberts, Bath, for respondent.

Before DENMAN, J.P., and GREEN, PINE, BALIO and SCHNEPP, JJ.

MEMORANDUM:

[1] On appeal from a judgment of conviction for criminal sale of a controlled substance in the first degree and related offenses, defendant's primary claim is that three eavesdropping warrants were issued without probable cause because the People did not establish "that normal investigative procedures have been tried and have failed, or reasonably appear to be unlikely to succeed if tried, or to be too dangerous to employ" (CPL 700.15[4]; CPL

700.20[2][d]). We disagree. Unlike the conclusory affidavits submitted in support of the eavesdropping warrants in *People v. Viscomi,* 113 A.D.2d 76, 495 N.Y.S.2d 298, the affidavits and attached exhibits here established that the nature and magnitude of the involvement of defendant and others in drug operations in the Steuben-Chemung County area and the evasiveness of defendant and his associates made it unlikely that normal investigative procedures, such as physical surveillance, undercover operatives or use of a search warrant, would reveal the sources of the drug supply or enable the police to gather evidence against the higher echelon of the drug operation. Under the circumstances of this case, issuance of the eavesdropping warrants was not an abuse of discretion (*see People v. Carson,* 99 A.D.2d 664, 665, 472 N.Y.S.2d 68; *People v. Romney,* 77 A.D.2d 482, 484-485, 483 N.Y.S.2d 941; *People v. Versace,* 73 A.D.2d 304, 307-308, 426 N.Y.S.2d 61; *People v. Penna,* 53 A.D.2d 941, 942, 385 N.Y.S.2d 400).

[2] We agree with defendant, however, that the evidence was insufficient to support the convictions for conspiracy in the second and fourth degrees respectively under counts two and four of the indictment. Nothing in the November 2, 1980 telephone conversation between defendant and Gina establishes an agreement to sell cocaine to Missien under the second count. Similarly, nothing in the November 6, 1980 conversation between defendant and Gina established an agreement to sell marijuana to Gina. Since the crime of conspiracy is an offense separate and distinct from the crime that is the object of the conspiracy (*see People v. McGee,* 49 N.Y.2d 48, 57, 424 N.Y.S.2d 157, 399 N.E.2d 1177, *cert denied sub nom Quamina v. New York,* 446 U.S. 942, 100 S.Ct. 2166, 64 L.Ed.2d 797), counts two and four of the indictment must be dismissed (*cf. People v. Krasnewicz,* App.Div., 498 N.Y.S.2d 670).

[3] We also agree with defendant that evidence of marijuana-related conversations should have been suppressed. The warrant, insofar as it authorized eavesdropping for evidence of such conversations, was unauthorized because it was outside the scope of CPL 700.05[8] in 1980 (*see People v. Hoffman,* 115 A.D.2d 257, 496 N.Y.S.2d 171). Accordingly, all of the conversations relating to marijuana should have been suppressed and the conviction involving criminal sale of marijuana (count three) must be reversed.

We have considered defendant's remaining claims and find that none requires reversal. We note that the claim regarding untimely sealing of the tapes was not preserved for review and, on this record, we decline to reach it in the interest of justice (*cf. People v. Paluska,* 109 A.D.2d 389, 390, 491 N.Y.S.2d 999). In any event, the contents of the seizure could be used for investigative purposes or to establish probable cause, though it might not have been admissible at trial (*United States v. Fury,* 554 F.2d 522, 532, *cert denied sub nom. Quinn v. United States,* 433 U.S. 910, 97 S.Ct. 2978, 53 L.Ed.2d 776). Defendant's challenge to the constitutionality of the three district jury system formerly used in Steuben County has been rejected by the Court of Appeals (*People v. Shedrick,* 66 N.Y.2d 1015, 1017, 499 N.Y.S.2d 388, 489 N.E.2d 1290).

Therefore, defendant's judgment for convictions under counts two, three and four of the indictment are reversed, those counts are dismissed and the sentences imposed thereon are vacated.

Judgment unanimously modified on the law and as modified affirmed.

CERTIFICATE DENYING LEAVE TO APPEAL TO THE NEW YORK COURT OF APPEALS

State of New York
Court of Appeals

BEFORE: HON. RICHARD D. SIMONS, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

ROBERT J. BAVISOTTO

Appellant.

CERTIFICATE DENYING LEAVE

I, RICHARD D. SIMONS, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to the CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Rome, New York
October 22, 1986

[Signature]
ASSOCIATE JUDGE

*Description of Order: Appeal from an order of the Appellate Division, Fourth Department, dated May 23, 1986 which modified and as modified affirmed a judgment of County Court, Steuben County, rendered October 23, 1982.

EAVESDROPPING WARRANT DATED AUGUST 28, 1980

[Exhibit "A"]

At County Court Chambers held in and for the County of Chemung at the Court House in the City of Elmira, New York on the 28 day of Aug, 1980.

Chemung
Aug. 28, 1980 (s) 9-6-81
Beverly Lanphear
Steven Morse

PRESENT: HONORABLE DONALD H. MONROE, County Court Judge.

STATE OF NEW YORK
COUNTY COURT: COUNTY OF CHEMUNG

In the Matter of the Application of D. BRUCE CREW III, Chemung County District Attorney, for an Eavesdropping Warrant pursuant to Article 700 of the Criminal Procedure Law permitting the Interception of Communications transmitted over the Telephone Instrument bearing number (607) 739-5513, located at 55 Collingwood Trailer Park, Town of Catlin, New York.	EAVESDROPPING WARRANT

D. BRUCE CREW III, District Attorney of the County of Chemung having submitted an application for an Eavesdropping Warrant with respect to communications transmitted over the telephone instrument bearing number (607) 739-5513, and

Upon reading the application of D. BRUCE CREW III, sworn to the 28 day of August, 1980, the Affidavit of RONALD G. MARTIN, sworn to the 28 day of August, 1980, the Affidavit of R.L. VAN HALL, sworn to the 28 day of August, 1980 and the transcript of a recorded telephone conversation between a confidential informant and one STEVEN MORSE, annexed hereto and made a part hereof marked Exhibit "A" and it appearing therefrom that there is probable cause to believe that evidence of the commission of the crimes of Criminal Possession of a Controlled Substance in the Fifth Degree, Criminal Possession of a Controlled Substance in the Fourth Degree, Criminal Possession of a Controlled Substance in the Third Degree, Criminal Possession of a Controlled Substance in the Second Degree, Criminal Possession of a Controlled Substance in the First Degree, Criminal Sale of a Controlled Substance in the Fifth Degree, Criminal Sale of a Controlled Substance in the Third Degree, Criminal Sale of a Controlled Substance in the Second Degree, Criminal Sale of a Controlled Substance in the First Degree, a conspiracy to commit any of the offenses of the New York State Penal Law enumerated above and/or an attempt to commit any of the felonies enumerated above may be obtained by the interception of communications transmitted over the telephone instrument aforesaid;

And it further appearing that no previous application for an Eavesdropping Warrant, either upon the person of STEVEN MORSE or telephone number (607) 739-5513 has been made to or issued by this Court or any other Court;

And it further appearing that the interception of communications transmitted over the telephone instrument aforesaid pertaining to those crimes specified above is necessary and essential in order to gain evidence of the commission of the aforesaid crimes and there is probable cause to believe that normal investi-

gative procedures reasonably appear to be unlikely to succeed if tried;

And it further appearing that the place where the telephone communications are to be intercepted is being used, about to be used and will continue to be used in connection with the commission of the crimes aforesaid and said premises and the aforesaid telephone instrument is being used by STEVEN MORSE for the commission of the crimes aforesaid and the interception of the communications over said telephone instrument will reveal agreements to buy and sell controlled substances by various unknown persons with STEVEN MORSE;

And it further appearing from the facts and circumstances recited in the application and affidavits that there are exigent circumstances in this matter of such a nature that if prior or simultaneous notice of this Eavesdropping Warrant were given to any prospective aggrieved person within the meaning of Section 2510 (11) of Title 18 of the United States Code, the purpose and objective to the investigation would thereby be frustrated and such notice would affirmatively serve to facilitate the commission of the aforesaid crimes and insulate the perpetrators thereof from detection;

NOW, THEREFORE, it is

ORDERED that this Warrant be executed by D. BRUCE CREW III personally or by any member of the New York State Police especially and particularly designated by said D. BRUCE CREW III for that purpose and they are hereby authorized and empowered to intercept, listen to, overhear, eavesdrop and make copies and permanently preserve by mechanical or electronic devices the telephone communications of a person known as STEVEN MORSE and/or other unknown persons on said telephone instrument, and that STEVEN MORSE or others conspiring with him, has been, is or will be engaged in the illegal traf-

ficking of controlled substances by means of a telephone instrument bearing the number (607) 739-5513 located at 55 Collingwood Trailer Park in the Town of Catlin, County of Chemung and State of New York and listed in the records of the New York Telephone Company for said premises and it is further

ORDERED that those conversations to be seized will be those conversations in the offer to buy controlled substances by other persons and the acceptance of said offers, the offer to sell quantities of controlled substances, namely Cocaine and other controlled substances, for transmitting of controlled substances, sale and possession information, instructions to and from sellers and buyers of controlled substances, receiving and transmitting instructions contrary to the Penal Law and in furtherance of illegal sale of controlled substances and possession of controlled substances, and a possession of controlled substances operation on a large scale and it is further

ORDERED that D. BRUCE CREW III personally or any member of the New York State Police especially and particularly designated by D. BRUCE CREW III hereby is authorized to do all things necessary to permit the interception of communications transmitted on the telephone instrument (607) 739-5513 and for the preservation of such communications, with authority to make secret entry upon premises in which the aforesaid telephone instrument is located and to install any eavesdropping device if such entry becomes necessary to execute this Warrant, and it is further

ORDERED that any and all intercepted communications, recorded and preserved by the District Attorney of the County of Chemung and his designated agents shall not be divulged except in accordance with the law and when not otherwise privileged by law, and it is further

ORDERED that this authorization to intercept shall be executed as soon as practicable and such interception is authorized for a period of thirty (30) days from the date of the commencement of the interception process and shall not automatically terminate upon first obtaining the described communications but shall continue until sufficient evidence to demonstrate and prove the extent of the controlled substances trafficking and the identity of all participants therein is gained, however, in any event such interception shall terminate thirty (30) days from the date of installation inclusive of such installation date, the maximum number of days permitted by statute and further that the interception process shall commence without prior or simultaneous notice to any potentially aggrieved persons and it is further

ORDERED that the daily interception authorized by this Warrant shall be without limitation as to hours of each day for and until the tenth (10th) day following commencement of the interception process whereupon a progress report shall be made to this Court showing what progress has been made toward achievement of the authorized objectives at which time this Court shall determine the extent to which continued daily interception shall be permitted and it is further

ORDERED that only those communications shall be intercepted that reasonably may be expected to relate to the criminal activity as specified above and as soon as it appears or with the exercise of reasonable diligence, should appear that a particular conversation will not be pertinent, the interception and monitoring of that conversation shall cease, and the interception and monitoring process shall, at all times, be conducted in such a way as to minimize the interception of communications which are not otherwise subject to interception and it is further

ORDERED that D. BRUCE CREW III or any member of the New York State Police especially and particularly designated by

said D. BRUCE CREW III are authorized and permitted to make duplicate tapes of any recordings of the communications authorized herein either simultaneously or at any time before the return is made and the original recordings are sealed, and it is further

ORDERED that the law enforcement officers conducting the interception and monitoring shall maintain a continuing log which reflects the precise time, date, duration and location of each intercepted communication or fragment thereof, as well as the suspected parties thereto and the general subject matter thereof, and it is further

ORDERED that any and all communications or fragments thereof which are intercepted and monitored pursuant to this Eavesdropping Warrant shall be fully and completely recorded and those recordings shall be protected from editing and alteration, and all such recordings shall be preserved in a safe and secure place until returned to this Court as provided therein below and no such recordings or portions thereof shall be altered or edited in any manner whatsoever, and it is further

ORDERED that upon the termination of the interception process as specified in this Warrant, District Attorney D. BRUCE CREW III and New York State Police Senior Investigator RONALD G. MARTIN shall immediately make a return to this Court of any and all logs and tape recordings obtained pursuant to the execution of this Warrant for the purposes of inventory, sealing and further disposition as required; and it is further

ORDERED that upon termination of this Eavesdropping Warrant as provided above, the interception and monitoring shall cease immediately and any and all equipment or devices installed for the purposes of conducting the interception shall be removed or otherwise inactivated as soon as practicable and, to this end; it is further

ORDERED that the agent and employees of the New York Telephone Company, upon request of the applicant, shall furnish the applicant forthwith, all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the service(s) that the New York Telephone Company is affording the person or persons (whose communications are to be intercepted). The furnishing of such facilities or technical assistance by the New York Telephone Company is to be compensated for by the applicant at the prevailing rates, and that the said agent and employees of the New York Telephone Company are directly constrained not to divulge the contents of this Warrant or the existence of electronic eavesdropping equipment connected to the above captioned telephone lines and instruments to any person, including but not limited to the subscriber to the above captioned telephone lines and instruments, whether or not said subscriber requests the telephone instrument be checked for the existence of said electronic eavesdropping equipment and it is further

ORDERED that within five (5) days of installation of any devices to effectuate the interceptions authorized by this Warrant an affidavit setting forth the date of such installation shall be filed with this Court. That said installation shall be made as soon as possible and in no event later than within ten (10) days of the signing of this order.

[Signature]
COUNTY COURT JUDGE

APPLICATION FOR EAVESDROPPING WARRANT

STATE OF NEW YORK
COUNTY COURT: COUNTY OF CHEMUNG

In the Matter
of
the Application of D. BRUCE CREW III, Chemung County County District Attorney, for an Eavesdropping Warrant pursuant to Article 700 of the Criminal Procedure Law permitting the interception of communications transmitted over the telephone instrument bearing number (607) 739-5513, located at 55 Collingwood Trailer Park, Town of Catlin, New York.

APPLICATION FOR EAVESDROPPING WARRANT

STATE OF NEW YORK)
COUNTY OF CHEMUNG) SS:

D. BRUCE CREW III, being duly sworn, deposes and says:

1. That deponent is the District Attorney of the County of Chemung and is the principal prosecuting attorney for said County.

2. That this application is made pursuant to Article 700 of the Criminal Procedure Law of the State of New York for an Eavesdropping Warrant permitting your deponent or members of the New York State Police specifically designated by your deponent to intercept conversations transmitted over telephone number (607) 739-5513. Upon information and belief, the grounds for deponent's information and the basis of his belief being the sworn Affidavit of RONALD G. MARTIN, annexed hereto and

made a part hereof, the instrument bearing such number is located in a trailer on lot 55 at the Collingwood Trailer Park in the Town of Catlin, County of Chemung and State of New York. Furthermore, to your deponent's knowledge or to that of his investigators no previous application for an Eavesdropping Warrant upon the person of STEVEN MORSE or telephone number (607) 739-5513 has been made to or issued by any court.

3. That your deponent has caused to be made certain investigations into the crimes of Criminal Possession of a Controlled Substance in the Fifth Degree, Criminal Possession of a Controlled Substance in the Fourth Degree, Criminal Possession of a Controlled Substance in the Third Degree, Criminal Possession of a Controlled Substance in the Second Degree, Criminal Possession of a Controlled Substance in the First Degree, Criminal Sale of a Controlled Substance in the Fifth Degree, Criminal Sale of a Controlled Substance in the Third Degree, Criminal Sale of a Controlled Substance in the Second Degree, Criminal Sale of a Controlled Substance in the First Degree, a conspiracy to commit any of the offenses of the New York State Penal Law enumerated above and/or an attempt to commit any of the felonies enumerated above. That the New York State Police have been cooperating with your deponent in the aforesaid investigations. That upon information and belief, the source of my information and the grounds for my belief being the facts contained in the attached Affidavits of RONALD G. MARTIN, sworn to the 28th day of August, 1980 and ROBERT L. VAN HALL, sworn to the 28th day of August, 1980, that said crimes are being committed by STEVEN MORSE and others, yet unknown, over a telephone instrument bearing number (607) 739-5513 located at 55 Collingwood Trailer Park in the Town of Catlin, County of Chemung and State of New York, which facts and statements I incorporate into this application as though the same were fully set forth herein upon information and belief.

4. By reason of the facts set forth in the aforesaid Affidavits, your deponent has probable cause to believe that the aforesaid crimes have been, are being or are about to be committed.

5. That your deponent has reasonable cause to believe that the interception of telephonic communications of STEVEN MORSE over the telephone instrument bearing number (607) 739-5513 between the aforesaid STEVEN MORSE and other unknown persons will furnish evidence of the commission of the crimes of Criminal Possession of a Controlled Substance in the Fifth Degree, Criminal Possession of a Controlled Substance in the Fourth Degree, Criminal Possession of a Controlled Substance in the Third Degree, Criminal Possession of a Controlled Substance in the Second Degree, Criminal Possession of a Controlled Substance in the First Degree, Criminal Sale of a Controlled Substance in the Fifth Degree, Criminal Sale of a Controlled Substance in the Third Degree, Criminal Sale of a Controlled Substance in the Second Degree, Criminal Sale of a Controlled Substance in the First Degree, a conspiracy to commit any of the offenses enumerated above and/or an attempt to commit any of the felonies enumerated above. That the conversations to be intercepted, if an Eavesdropping Warrant is issued, will pertain to and be relevant to the prosecution of the aforesaid crimes.

6. As can be determined from the Affidavits annexed hereto, normal investigative procedures reasonably appear to be unlikely to succeed if tried. Additionally, it is respectfully submitted that normal investigative procedures cannot provide information with regard to the hierarchy of the "drug" trafficking operation reasonably believed to be taking place nor can it be determined without an Eavesdropping Warrant with whom the aforesaid STEVEN MORSE is conspiring nor would normal investigative procedures reasonably appear to be likely to succeed if tried.

7. The conversations sought to be intercepted are not legally privileged and permission is not requested to intercept any conversation that is legally privileged or does not permit to the crimes set forth above.

8. It is requested that if an Eavesdropping Warrant is issued upon this application that it be made effective for a period of thirty (30) days from installation and designate that the conversations be intercepted without limitation as to hours of each of said days, since the kind of enterprise being investigated and believed to be conducted over the telephone instrument referred to herein is not limited to such specific hours that a Warrant can define precisely and limit the period during which the interception can be conducted and your deponent has no reasonable basis to know when the telephone conversations sought to be intercepted will take place nor how many "unknown" persons will be involved in such conversations with the aforesaid STEVEN MORSE.

9. The crimes set forth herein and as set forth in the attached Affidavits are continuing crimes and the interceptions should not automatically terminate upon the interception of a single particularly described conversation. The facts disclose that STEVEN MORSE is so engaged in the aforementioned violations of law and therefore requires the Eavesdropping Warrant should be allowed to continue until the expiration of the full thirty (30) days, until all conversations have been analyzed and compared, and all leads obtained therefrom investigated.

WHEREUPON, your deponent requests that an Eavesdropping Warrant be issued herein authorizing the interception and use of mechanical or electronic devices for the overhearing and recording of conversations of STEVEN MORSE and other unknown persons with whom the said STEVEN MORSE is engaged in a conspiracy and with whom the said STEVEN MORSE is engaged in the trafficking of controlled substances by and through

the use of a telephone instrument bearing the number (607) 739-5513 which is located in a trailer at 55 Collingwood Trailer Park, Town of Catlin, County of Chemung and State of New York. That those conversations to be seized will be those conversations in the offer to buy controlled substances by other persons and the acceptance of said offers, the offer to sell quantities of controlled substances, namely Cocaine and other controlled substances, for transmitting of controlled substances, sale and possession information, instructions to and from sellers and buyers of controlled substances, receiving and transmitting instructions contrary to the Penal Law and in furtherance of illegal sale of controlled substances and possession of controlled substances, and a possession of controlled substances operation on a large scale. Further it is requested, providing that said authorization to intercept shall be executed as soon as practicable, such interception to be authorized for a period of thirty (30) days from the date of commencement of the interception process and not to automatically terminate upon first obtaining the above described communications but to continue until sufficient evidence to demonstrate and prove the extent of the aforesaid trafficking and the identity of all participants therein shall be gained, but in any event to terminate thirty (30) days from the date of installation inclusive of such installation date, and providing that the interceptions be made without limitation as to the hours of each day for and until the tenth (10th) day following commencement of the interception process and providing that a progress report be made to the Court at that time demonstrating what progress has been made toward achievement of the authorized objectives of the Warrant

and at which time said Court shall determine the extent to which continued daily interception will be permitted providing for secret entry upon the premises in which the aforesaid telephone instrument is located and permitting installation of any eavesdropping device therein if such entry becomes necessary to execute this Warrant.

[Signature]
D. BRUCE CREW III

Subscribed and sworn to before
me this 28 day of August, 1980
[Signature]
Notary Public

RONALD G. MARTIN AFFIDAVIT IN SUPPORT OF APPLICATION FOR EAVESDROPPING WARRANT

STATE OF NEW YORK
COUNTY COURT: COUNTY OF CHEMUNG

In the Matter
of
the Application of D. BRUCE CREW III, Chemung County District Attorney, for an Eavesdropping Warrant pursuant to Article 700 of the Criminal Procedure Law permitting the interception of communications transmitted over the telephone instrument bearing number (607) 739-5513, located at 55 Collingwood Trailer Park, Town of Catlin, New York.

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF CHEMUNG) SS:

RONALD G. MARTIN, being duly sworn, deposes and says:

1. That your deponent is a Senior Investigator in the New York State Police attached to Troop "E", Canandaigua, New York. That I am the Unit Supervisor of the Troop "E" Narcotics Squad which is presently conducting an investigation into narcotics trafficking in the Counties of Steuben and Chemung.

2. That said investigation has disclosed that STEVEN MORSE, date of birth 6/16/56, of 55 Collingwood Trailer Park, Town of Catlin, Chemung County, New York, and others yet unknown have been and are engaged in the illegal distribution of Cocaine in the Chemung-Steuben County area. Further there is probable cause for belief that MORSE is utilizing telephone instrument (607) 739-5513 to arrange for distribution and resupply of Cocaine as reflected in this affidavit and in the attached

affidavit of Investigator R. L. VAN HALL. That said distribution has been and is taking place at 55 Collingwood Trailer Park, Town of Catlin, Chemung County, New York. The Collingwood Trailer Park is located on the east side of Chambers Road approximately five-tenths of a mile north of the junction of Brown and Chambers Road in the Town of Catlin, Chemung County. The trailer court road upon which lot 55 is located is the south branch of the "Y" that enters said trailer park south of the grocery store. Lot 55 is the seventh (7th) trailer east of the trailer park entrance on the north side of the trailer court road. Surveillances on 8/14/80 disclose lot 55, Collingwood Trailer Park is a housetrailer, color white with black trim, the south end of said trailer is color pea green with black trim. Said trailer is further denoted by the numerals 126 on the southwest side and the name "Statesman" on the south side of said trailer.

3. On 8/14/80 a confidential informant told me that in the previous three months he had purchased approximately eight (8) ounces of Cocaine from STEVE MORSE. That said purchases were arranged for by calling MORSE at telephone instrument (607) 739-5513.

4. On 8/14/80 at 3:40 P.M., I obtained written permission from this confidential source to mechanically record his telephone conversations with STEVE MORSE. Your deponent then dialed (607) 739-5513 and handed the receiver to the confidential informant and mechanically recorded and overheard the conversation the confidential informant had with STEVE MORSE. Attached hereto and made a part hereof is the verbatim transcript of said conversation marked Exhibit "A". I then went to the Collingwood Trailer Park where at 4:40 P.M., I saw STEVE MORSE exit the trailer at lot 55, enter a red compact and drive out of my line of sight. At 4:45 P.M., I again saw said vehicle being operated by STEVE MORSE near the rear of Collingwood Trailer Park, at that time said confidential informant exited the above

vehicle and walked towards a vehicle operated by Investigator R. L. VAN HALL.

5. That I have approximately ten (10) years narcotics experience and during that time have investigated numerous controlled substance operations and utilized numerous informants. Based on that experience and the aforementioned events, it is my opinion that STEVEN MORSE is a participant in a major Cocaine distributing ring operating in the Chemung-Steuben County area.

6. That as reflected in the attached transcript of telephone conversation between the confidential informant and STEVEN MORSE; MORSE tells the confidential informant regarding a discussion about money for the Cocaine, the following "Well maybe I could, you know, talk to him and I could owe him the money or you could owe me the money or something". This discloses that others are involved in the Cocaine distribution operation at a level higher that MORSE.

7. That upon information and belief, the source of which is the same confidential informant, who I believe, MORSE told said informant that MORSE can get as much Cocaine as the confidential informant wanted.

8. That the purpose of this Eavesdropping Warrant is to determine the source of Cocaine being sold by MORSE along with other subjects purchasing and/or conspiring to distribute Cocaine from MORSE.

9. That the location of Lot 55 is situated in the Collingwood Trailer Park so as to make anything other than spot surveillances impractical. That although suppliers and purchases may travel to 55 Collingwood Park and transact business, other people enter and leave said premises for legitimate purposes. Therefore it is unlikely that surveillances of the aforementioned premises

would disclose the identity of subjects that are supplying Cocaine to or purchasing Cocaine from STEVE MORSE. That it is not likely that execution of a Search Warrant at the above address would yield evidence necessary for the prosecution of the source of Cocaine for MORSE and others involved in purchasing and/or distributing Cocaine from MORSE.

10. That upon information and belief, the source of which is your deponent's conversations with a confidential informant, it would not be possible for said confidential informant to introduce an undercover operative to STEVE MORSE for the purpose of making a Cocaine purchase. Further that said confidential informant does not know the source of Cocaine being distributed by MORSE.

11. That as aforementioned in your deponent's affidavit, STEVE MORSE utilizes telephone instrument (607) 739-5513 to arrange for the sale of Cocaine to your deponent's confidential informant. Therefore, probable cause exists for belief that MORSE also utilizes telephone instrument (607) 739-5513 to arrange for re-supply and distribution to other subjects as yet unknown in this trafficking conspiracy. Further that those conversations sought to be seized will be those conversations in the offer to buy controlled substances by other persons and the acceptance of said offers, the offer to sell quantities of controlled substances, namely Cocaine and other controlled substances, for transmitting of controlled substances, sale and possession information, instructions to and from sellers and buyers of controlled substances, receiving and transmitting instructions contrary to the Penal Law and in furtherance of illegal sale of controlled substances and possession of controlled substances, and a possession of controlled substances operation on a large scale.

12. Therefore only the execution of an Eavesdropping Warrant on telephone instrument (607) 739-5513 would furnish that evidence, of telephone conversations, which is necessary for the

identification of all persons involved in the Cocaine trafficking conspiracy.

13. Based on your deponent's past experience, many drug distributors have more than one source of a controlled substance. Therefore once a particularly described wire communication has been intercepted pursuant to an Order of Authorization, additional wire communications of the same type will occur and the Order of Authorization should not automatically terminate when the particularly described type of communication has been first obtained, but should continue.

14. It is further requested that permission be granted to intercept the wire communications particularly described at all hours of the day and night, since the conversations sought could occur at any time of the day or night. New York Telephone Company records disclose that telephone number (607) 739-5513, is listed to BEVERLY J. LANPHEAR, Lot 55, Collingwood Trailer Park, Town of Catlin, Chemung County, New York. That the purpose of this investigation is to establish the identity of and obtain evidence necessary for prosecution of others unknown who are involved in the STEVEN MORSE Cocaine trafficking operation. This could not be completed without the execution of said Eavesdropping Warrant.

15. That since simultaneous notification to the subscriber of the existence of an Eavesdropping Warrant on telephone instrument (607) 739-5513 would be self defeating, it is requested that the New York Telephone Company be ordered not to notify the subscriber until such time as the investigation of MORSE and his conspirators is concluded as provided for in Section 700.50 of the New York State Criminal Procedure Law.

[Signature]
RONALD G. MARTIN

Sworn to before me this
28 day of August, 1980.
[Signature]
Notary Public

ROBERT L. VAN HALL AFFIDAVIT IN SUPPORT OF APPLICATION FOR EAVESDROPPING WARRANT

STATE OF NEW YORK
COUNTY COURT: COUNTY OF CHEMUNG

In the Matter

of

The Application of D. BRUCE CREW III, Chemung County District Attorney, for an Eavesdropping Warrant pursuant to Article 700 of the Criminal Procedure Law permitting the interception of communications transmitted over the telephone instrument bearing number (607) 739-5513, located at 55 Collingwood Trailer Park, Town of Catlin, New York. AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF CHEMUNG) SS:

ROBERT L. VAN HALL, being duly sworn, deposes and says:

1. That I am an Investigator in the New York State Police Bureau of Criminal Investigation stationed at Canandaigua, New York. That I am presently assigned as an undercover operative with the Troop "E" Narcotics Squad. That said Squad is conducting an investigation into the illegal trafficking of controlled substances in the Steuben and Chemung County areas.

2. That on August 14, 1980 a confidential informant made arrangements telephonically with STEVEN MORSE for the purchase of approximately one ounce of Cocaine for the sum of

$1,500.00. That on August 14, 1980 the confidential informant and myself, operating a State Police undercover vehicle, proceeded to the grocery store located in front of the Collingwood Trailer Park, Chambers Road, Town of Catlin, Chemung County, New York, arriving at 4:24 P.M. The confidential informant made an outgoing telephone call at 4:26 P.M. from the pay telephone located outside the grocery store. That upon information and belief, the source being the confidential informant, the telephone number dialed by the confidential informant was 739-5513 and the subject he conversed with, was STEVEN MORSE.

3. The confidential informant advised me that he told MORSE that he was at the store and that STEVEN MORSE said he would be there in five minutes. At this time I gave the confidential informant $1,500.00 in United States Currency.

4. That at 4:29 P.M., I observed STEVEN MORSE arrive at the grocery store operating a 1980 red Ford bearing New York registration 587-ZAH. MORSE entered the grocery store and was followed in by the confidential informant. That at 4:31 P.M. MORSE and the confidential informant came out of the grocery store and walked to the 1980 Ford. MORSE got into the vehicle and engaged in a brief conversation with the confidential informant who was standing by the driver's door of said vehicle. That at 4:32 P.M. STEVEN MORSE drove out of the grocery store parking lot and entered the south driveway to the trailer park. The confidential informant returned to the undercover vehicle and told me that he had given MORSE the $1,500.00 and that MORSE said to meet him in the back of the trailer park by the railroad ties to get the Cocaine.

5. I then drove to the rear of the Collingwood Trailer Park and parked by a sand box made of railroad ties located in the playground area. At 4:44 P.M. MORSE drove to an intersection near my location and stopped. The confidential informant went

to the vehicle and talked to MORSE through the open passenger window, then entered the vehicle. MORSE then drove past me and pulled off the road behind my vehicle.

6. That at 4:45 P.M. the confidential informant left MORSE'S vehicle and returned to the undercover vehicle. MORSE then drove out of my line of sight. The confidential informant removed a clear plastic zip-loc baggie, containing a white crystaline substance, from his pants and gave it to me.

7. That myself and the confidential informant then proceeded directly to the Horseheads State Police barracks where a three stage Scott Reagent field test was conducted on the white crystaline substance showing a positive result for the presence of Cocaine.

8. That on August 15, 1980 I caused the white crystaline substance purchased from STEVEN MORSE to be submitted to the New York State Police Scientific Laboratory in Albany, New York, via certified mail #P14-2720841, for analysis.

9. That on information and belief, being a telephone conversation with the New York State Police Scientific Laboratory, Senior Chemist JOAN SMITH, on August 18, 1980 at 11:54 A.M., the white crystaline substance purchased from STEVEN MORSE contains 30.19 grams of the controlled substance Cocaine, a narcotic drug.

[Signature]
ROBERT L. VAN HALL

Sworn to before me this
28 day of August, 1980.

[Signature]
Notary Public

EXHIBIT "A"

8/14/80, 3:40 P.M., CONFIDENTIAL INFORMANT calling from (607) 962-3282 to STEVEN MORSE (607) 739-5513.

SM: Hello.

CI: Yo, Steve?

SM: Yeah.

CI: Hey, what's going on.

SM: Oh, not much just waiting around for your call.

CI: Yeah, I got a little problem. Listen we got 1500 bucks, what can you do, can you take some out or what.

SM: You only got 15?

CI: Yeah, it's all I could come up with.

SM: Yeah. Where you at up there now?

CI: Yeah, I'll be coming down in a few minutes.

SM: Aa.

CI: I had to take care of some personal problems for my sister first.

SM: See, I don't have any money. I don't know if he'd cut it short, maybe I could talk to him and ask if a

CI: Well what should I do then if he cuts it short or what. What would he cut it short, I mean just

SM: Well maybe I could, you know, talk to him and I could owe him the money or you could owe me the money or something

CI: Well all right well

SM: . . . trust me for the other hundred and a half.

CI: Well, shit, let me see what I can do, let me see if I can get the rest of the bucks, ok? If not, I'll, I'll, we'll figure out something when I get down there ok?

SM: If not a

CI: Call and tell you?

SM: . . . try to figure out something, take a "G" out or something

CI: Ok, all right.

SM: But you're at the store now.

CI: No, no, I'm I'm just leaving . . . Corning

SM: Do you want me to start getting things set here?

CI: Yeah, would you?

SM: Ok, for sure you're coming.

CI: Yep, I am definitely, I'll be there in about 20 minutes.

SM: About 20 minutes?

CI: Yep.

SM: Ok.

CI: Ok.

SM: Bye.

CI: Bye.